JD–15–05
Cleveland, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SUNRISE SENIOR LIVING, INC.

and Case No. 8-CA-34969-1

UNITED FOOD & COMMERCIAL
WORKERS UNION LOCAL 880,
AFL-CIO

SUNRISE SENIOR LIVING, INC.

and Case No. 8-CA-35060-1

ROSIE HOWARD, AN INDIVIDUAL

Susan Fernandez, Esq.,
for the General Counsel.
Fred Freilicher, Esq., and
Thomas P. Murphy, Esq.
(Hunton & Williams)
McLean, Virginia
for the Respondent.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Cleveland Ohio, on September 30, October 1, and October 14, 2004. The United Food & Commercial Workers Union Local 880, AFL-CIO (the Union), filed the charge in case 8-CA-34969-1 on April 7, 2004, and an amended charge on June 23, 2004. Rosie Howard, an individual, filed the charge in case 8-CA-35060-1 on May 18, 2004. The Director of Region 8 of the National Labor Relations Board (the Board) issued the consolidated complaint on June 30, 2004. The complaint alleges that Sunrise Senior Living, Inc. (the Respondent) violated Section 8(a)(1) of the Act by: interrogating employees about concerted protected activities; discharging one employee and demoting another because they submitted a petition complaining to the Respondent about terms and conditions of employment; and discharging one of its supervisors because of her refusal to commit an unfair labor practice. The Respondent filed a timely answer in which it denied that it committed any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The Respondent, a Delaware corporation with an office and place of business in Parma, Ohio (the Parma facility), operates assisted living facilities. In conducting this business it annually receives at the Parma facility goods valued in excess of $50,000 directly from points outside the State of Ohio and derives gross revenues in excess of $100,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Respondent operates a chain of long-term care facilities for elderly individuals. The allegations in this case involve the Respondent's Parma, Ohio, facility -- one of five locations it has in the Cleveland area. The Parma facility is divided into two sections. The "reminiscence" section is designed for the facility's more severely debilitated residents and is kept locked. Many of these residents have Alzheimer's disease or other forms of dementia and require intense supervision. The other section is referred to as "assisted living." Although this section is designed for the facility's less severely debilitated residents, its inhabitants nevertheless include many who require assistance with daily activities such as dressing, bathing, and grooming. Approximately half of the Parma facility's residents are incontinent.

Direct care to residents is generally provided by care aides[1] who are not professional nurses. A number of the care aides are designated as "lead" care aides who are responsible both for providing direct care and overseeing the care provided by other care aides. Samantha Reyes and Coty Smith, two of the individuals the General Counsel alleges the Respondent discriminatorily disciplined, were both lead care aides at the time the challenged discipline was imposed. In that capacity, Reyes and Smith were designated to receive complaints from care aides about payroll record errors. The care aides, including those designated as lead care aides, have not been represented by a labor organization at any time relevant to this case.

The care aides and lead care aides are directly supervised by the facility's resident care coordinator. The resident care coordinator's responsibilities include maintaining adequate staffing at the facility, helping to hire and train care aides and lead care aides, and disciplining care aides and lead care aides. The resident care coordinator also has authority over the care aides' schedules, although the lead care aides are responsible for communicating employees' scheduling desires to the resident care coordinator for approval. Rosie Howard, an alleged

[1] The Respondent refers to these individuals as "care managers," but the parties agree that they are rank-and-file employees – not management officials or supervisors for purposes of the Act. This is also true of those designated as "lead" care managers. In order to avoid any confusion about their status as employees under Section 2(3) of the Act, I refer to these individuals throughout the decision as "care aides" and "lead care aides." The Parma facility generally has between 25 and 35 such employees.

discriminatee in this case, was the facility's resident care coordinator from the fall of 2002 until her discharge in March 2004.[2] As resident care coordinator, Howard was one of five department heads at the facility. The department heads report directly to the facility's executive director.

At the time when the violations are alleged to have occurred, the Parma facility had approximately 68 residents, of whom 21 were in the reminiscence unit. Depending on the shift, there were generally anywhere between three and seven care aides on duty at the facility to attend to the residents' needs. The care aides duties were extensive and included: dressing, bathing, and toileting the residents; ordering and dispensing incontinence products; making the residents' beds and taking off soiled linens; removing soiled incontinence products from residents; transferring residents from beds to chairs; vacuuming and cleaning carpets; taking meal orders from residents; setting the dining room table and serving meals; hand feeding residents who required such help; cleaning up after meals; and washing dishes.

During the period leading up to the alleged violations in this case, some care aides at the facility found that the Respondent was requiring them to perform duties in addition to those they were accustomed to performing. These duties included washing the residents' clothes, carrying soiled incontinence products out of the facility, assessing whether residents in distress should be referred for care outside the facility, participating directly in the residents' recreational activities, and dispensing prescription medication and ointments.[3] A number of care aides and lead care aides felt that they were being overburdened with expanded responsibilities. Two testified that whenever other types of employees did not want to do their job duties, the care aides would end up having to perform the tasks. Some care aides routinely expressed their dissatisfaction with the job by joking that they were going to quit or were not going to appear when scheduled to work. Such comments were made to Howard on a daily basis when she was resident care coordinator, but she did not take the statements seriously and typically gave responses such as: "I'll be here, and I know you will be too"; "You do what you have to do"; or, simply, "I'll see you tomorrow." The record does not show any instance when a care aide actually failed to appear for work after Howard reacted in this manner.

On March 1, 2004, shortly before the violations are alleged to have occurred, a new executive director started at the Parma facility. This individual, Susan Johnson, had begun working for the Respondent 6 weeks earlier, on January 15, as an "executive director in training," and the Parma facility was her first assignment as an actual executive director. To help Johnson adjust to her new responsibilities, the Respondent arranged to have two executive directors from other facilities each spend one day a week at the Parma facility for a period of 6 weeks. One of those executive directors, Natalie Antosh, managed the Respondent's Rocky River facility and came to Parma every Wednesday. The other, Ann Worley, was the executive director at the Respondent's Wooster facility and came to Parma on Tuesdays.

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[2] The parties agree that Howard was a supervisor within the meaning of Section 2(11) of the Act during the relevant time period.

[3] There was testimony that it is impermissible under Ohio law for care aides who are not licensed practical nurses or registered nurses to "pass" medications to residents in assisted living homes. Nothing in this decision is meant as, or should be construed to be, a determination as to whether the care aides dispensed prescription medication under circumstances that were inconsistent with any State or local law or regulation.

B. The Care Aides' Petition And Discussion Of Work Stoppage

On Friday, March 5 -- just 4 days after Johnson began as the Parma facility's executive director – care aides created, and began to circulate, a petition stating that they were overburdened by their expanded responsibilities. The petition complained not only about the additional duties it said care aides had been performing, but also about the prospect of having "colostomy care" -- i.e., care of a resident's colostomy bag[4] -- added to their responsibilities. The petition stated that the care aides felt colostomy care went "above and beyond what [they] should be doing as unskilled care [aides] in assisted living." Twenty-four care aides and lead care aides signed the petition. The evidence did not show that any of the petition's proponents used threats or undue pressure to obtain the signatures on the petition. Some of the care aides read the petition before signing it, but other chose to sign based on another employee's verbal description of the petition's contents. In its entirety the petition read as follows:

> To Whom It May Concern:
>
> On behalf of all the Sunrise of Parma Care [Aides], we would like to let it be known that we have talked among each other and have all agreed that we are unwilling to accept responsibility for any colostomy care. We do more than our share of work here. We are responsible for all resident care, we are laundry attendants, housekeepers, dishwashers, servers, cooks, maintenance, marketing, receptionist, entertainment, we do activities, we are plumbers, physical therapist[s], we even on occasion pass pills to residents, we change resident bandages, we apply prescription creams on residents. The care [aides] collect urine and fecal specimens; we have to get all of the resident's weights monthly sometimes even several times. We are subjected to verbal abuse by angered family members, and were disrespected by the management team. We don't feel as if we are a part of this team, we are never included in any decisions that are made in this home and we are the ones that deal the most with these residents! Out of sixty-seven residents forty-four of them are total care. Total care is A.L.++ or Rem+. We have twelve two person assist, nine feeds and forty incontinent residents, and three hoyer lifts. We are also expected to come in and nurture these residents and create pleasant days. The one and only daily assignment that is assigned to the management staff, which is to [a]ssist in the dining room in both neighborhoods never occurs, which puts additional work on the care managers. Finally, we feel that colostomy care goes above and beyond what we should be doing as unskilled care [aides] in assisted living. We as a group have all reached our limit in additional job assignments and hope this situation is addressed without further action needed.
>
> Thank you,
> [24 Signatures]

On Tuesday, March 9, three lead care aides – Nadiya Balukh, Samantha Reyes, and Coty Smith – presented the signed petition to Johnson. Johnson read the petition while the three presenters waited. After reading it, Johnson asked who had written the petition, but no one answered. Johnson told the three presenters that the Parma facility's care aides were overpaid, earning more than those at other facilities in the area. Regarding colostomy care, Johnson stated that a resident who required that service was returning to facility regardless of

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[4] A colostomy bag is a plastic bag that fits over a stoma, or hole, in the individual's abdomen through which feces are diverted. The bag can be opened and emptied without being removed from the individual. The bag itself must be changed periodically, but not on a daily basis. The Respondent's officials testified, without contradiction, that changing a colostomy bag is a skilled task for a nurse, but that emptying a colostomy bag is work that care aides could be trained to perform.

the concerns expressed by the care aides. She said that colostomy care was "not bad," and that they should not be worried about providing it. Smith explained to Johnson that the petition was not really about the colostomy care, but about the fact that whenever other personnel at the facility did not want to do a task, that task ended up being added to the care aides' duties. Smith told Johnson: "If nurses didn't want to pass pills, the care [aides] did it. If the toilet needed plunged, the care [aides] did it. There were times when the care [aides] had to cook." Reyes commented that given their expanded duties, she did not believe that the care aides were being allowed the time they needed to provide direct care to residents. She complained that the maintenance coordinator, William Hackett, tried to assign tasks to care aides. One of the presenters complained that the care aides were being required to take out the garbage. It is not clear that Balukh said anything of substance during the meeting. Johnson told the presenters that she would look into their concerns. Despite this statement by Johnson, Smith felt that Johnson had evidenced a negative attitude toward the petition. On that basis, Smith told other care aides after the meeting that she did not believe anything was going to change as a result of their petition. A copy of petition was presented to Howard that day, but Howard was speaking by telephone with a resident's family at the time, and did not discuss the petition with the presenters.

Johnson testified that she was troubled that the employees had chosen to communicate their complaint to her in the form of a group petition. She said that in her view "it would have been nice if they had come and talked to me one on one instead of just all of a sudden presenting me with the letter." Johnson told Cynthia Boldan, one of the petition's signatories, that if employees had concerns they could be dealt with by talking to her, and that it was not necessary to put their problems down in a "letter."

Minutes after the meeting at which the petition was presented, Johnson contacted Charles Latta, the area manager for the Respondent's northern Ohio operations, and read the petition to him. Latta told Johnson to discuss the petition with Laurel Thomas, a corporate human resources director. Latta also contacted his own superior about the petition. As a result of one or more conference calls, the Respondent decided that Johnson would meet with the care aides in small groups to discuss the petition.

After Balukh, Reyes, and Smith left the meeting at which they presented the petition to Johnson, they paused to discuss what had happened. Balukh said that they should give Johnson a chance to address their concerns. Reyes disagreed, and suggested that the care aides engage in a work stoppage. Smith was present, but did not take a position for or against the idea of a work stoppage. This discussion took place in an office that was putatively Howard's, but which other employees used when they wanted to make phone calls or discuss something out of the hearing of residents. Howard was in the office -- eight to ten feet from Reyes -- during this discussion, but she was working at a computer and did not participate in the conversation, or give any indication that she was paying attention to what was being discussed.

Later on March 9, Smith told Cynthia Boldan, a care aide, that some employees were thinking about participating in a work stoppage because they felt overwhelmed with work, and that a number had already agreed to participate. Smith asked Boldan whether she would take part in such an action, and Boldan said that she would not do so.[5] The next day, March 10,

[5] I credit Boldan's testimony that Smith asked her whether she would be willing to participate in a work stoppage, Tr. 379-80, over Smith's somewhat ambiguous testimony that she does not "believe" she posed that question, Tr. 470. In general, Boldan's testimony regarding the conversation was clearer and more certain than Smith's. Compare Tr. 379-81 with

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Reyes told three care aides – Tania Kaufman, Lisa Dousa, and Olexander Chepak – that they should not come into work on March 11 because the care aides were staging a work stoppage.[6] Reyes said that if they came to work, they would be the only ones on duty and would end up having to do everything by themselves. The three care aides told Reyes that they would not participate in a work stoppage. Kaufman testified that she did not want to participate because there would be no one to take care of the residents and was concerned about losing her job. Chepak told Reyes that she would not participate because she did not want to be fired.[7]

Within minutes of hearing about the work stoppage from Reyes, Kaufman approached Howard and told her that care aides were talking about staging a work stoppage and asked "what should be done about it." Howard responded in the same vein as she typically did when care aides said that they would not come to work; she said, "Do what you have to do." Balukh also approached Howard and told her that she did not "think it's [a] good idea" for the care aides to engage in a work stoppage. Howard answered, "Do what you got to do." Another lead care aide, Katherine Sobolewski also came to Howard after Reyes encouraged her to engage in a work stoppage. Sobolewski told Howard that she was not going to participate in the work stoppage, and Howard responded more or less as she had to Kaufman and Balukh.[8]

C. Johnson Seeks Information About Petition And Work Stoppage Discussions

As Howard was leaving the building on March 9, she passed Johnson's office and Johnson called her in. Johnson asked Howard whether she had seen the care aides' petition, and Howard responded that she had. Then Johnson asked whether Howard knew who wrote the petition. Howard said she did not know, and Johnson asked whether Howard had tried to find out. Howard said she had not, and Johnson said, in a raised voice, "You supervise these people and you don't know who wrote the letter?" Johnson told Howard that they had to find out who wrote the petition. Howard pointed out that the petition was signed by about "95 percent" of care aides, and said that she was more concerned about the contents of the petition than about the identity of its authors. She told Johnson that she would not ask the care aides to divulge who had authored the petition. That day Johnson also had a conversation about the petition with her administrative assistant, Crystal Ferguson. During that conversation Ferguson discussed with Johnson the potential for a work stoppage by care aides.

On March 10, Johnson held meetings with the care managers in the Parma facility's private dining room in groups of between three and five. The private dining room is a glass-

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467-70. Based on that, and the witnesses' respective demeanors, I believe Boldan's account of the exchange was more reliable than Smith's. Both witnesses testified on behalf of the General Counsel.

[6] I found Reyes a less than fully credible witness based on her demeanor and testimony, and do not accept her claim that she never discussed a work stoppage with other employees. Tr. 402. That testimony was contradicted by multiple witnesses, including Smith who, like Reyes, testified on behalf of the General Counsel. Tr. 452-53, 494-96, 559-60, 672, 692-94.

[7] The record does not substantiate the Respondent's assertion, Brief of Respondent at 51, that Reyes was encouraging employees to use sick leave on March 11.

[8] The General Counsel argues that I should not credit the testimony of Kaufman, Balukh, and Sobolewski about what transpired when they informed Howard about the possible work stoppage. However, I found their testimony on this subject plausible, credible, and mutually corroborative. Moreover, Howard conceded that she had heard rumors about a work stoppage, and that when employees threatened not to come to work she typically made responses along the lines of those attributed to her by Kaufman, Balukh, and Sobolewski.

enclosed area, adjacent to the resident dining area. Other management officials attending these meetings were Linda Olsavsky – the Respondent's area director of resident care – and Antosh. Johnson and Antosh did most of the talking and questioning at the meetings and their focus was on finding out how the petition had been drafted, circulated, and signed -- not on addressing the complaints stated in the petition. They asked whether the care aides knew who had written the petition. When care aides denied knowledge, Johnson and Antosh sometimes posed the question repeatedly. Johnson and Antosh also asked the care aides to reveal who had given them the petition and to state whether they had read the petition before signing. A number of care aides answered that they had not read the petition, including at least one, Amber Hines, who had actually read it, but lied because she felt intimidated during the questioning and feared her job was in jeopardy. One or more care aides identified Reyes as the person who had solicited them to sign the petition. Another care aide, Lisa Dousa, told Johnson that Reyes and Smith had drafted the petition.[9] Olsavsky told the care aides that they would receive training on how to provide colostomy care. Johnson did not tell the care aides that the meetings were voluntary or that their jobs were not in jeopardy.[10] In fact, when one care aide asked Johnson whether the person who wrote the letter was going to be in trouble, Johnson provided no assurances to her. A number of care aides testified that they feared for their jobs during Johnson's questioning about the petition. One care aide, Paula Fuller, was visibly

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[9] I found Dousa to be lacking in credibility, and reject most of her testimony about the creation of the petition, her discussions with employees and company officials, and matters disputed by other witnesses. Dousa testified in an unusually stiff, almost mechanical, manner, and did not appear to be responding spontaneously or candidly to questions. Moreover, Dousa's hostility towards Howard for demoting her from the position of "lead" care aide, and towards Smith for replacing her in that position, was palpable during her testimony. Dousa said that Howard wanted to "get rid" of her. She volunteered negative information in an effort to portray Howard and Smith in an unfavorable light. At times she also strained to minimize her own role in the creation of the petition that so disturbed Johnson. Moreover, much of Dousa's testimony was implausible. For example, she testified that even after she told proponents of the work stoppage that she opposed it and would not participate, those same individuals repeatedly confided in her about their efforts, and asked her to assist in convincing others to participate. Despite finding Dousa an unreliable witness, I do credit her testimony that she told Johnson that Smith and Reyes had written the petition. I can see no motivation for Dousa, who testified on behalf of the Respondent, to falsely provide this testimony, which undercut the Respondent's claim that Johnson did not know who wrote the petition when she issued the challenged discipline. See *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) ("A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says."), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Containers, Inc.*, 325 NLRB 17 fn. 1 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony).

[10] In general, I did not find Johnson a very credible witness based on her demeanor and testimony and do not credit her self-serving assertions that she put the care aides at ease by opening each meeting with a statement that attendance was voluntary and that the care aides' jobs were not in jeopardy. Johnson's testimony on this score was given without much conviction, generally in response to suggestive questions by Respondent's counsel. Tr. 122-23, 135, 137. Moreover, although Johnson's claim was supported by the testimony of two other management officials, I consider it very telling that not one of the care aides who testified, including those called by the Respondent, corroborated Johnson's claim that she had provided these assurances. To the contrary, care aides credibly testified that they were afraid their jobs were in jeopardy during the meetings and\or that Johnson did not assure them that the meetings were voluntary and would not result in job loss. Tr. 345-47, 374-76, 508, 538-39.

shaking when she left the interrogation.

After the care aide meetings, but before leaving the facility on March 10, Johnson heard from multiple sources that care aides were planning to stage a work stoppage on March 11. Hackett, the facility's maintenance coordinator, told Johnson that Kaufman and Balukh had expressed concern to him that care aides would not appear for work the following day. Chepak came to Johnson and told her about the possibility that the care aides would not appear for work. Johnson asked Chepak whether she thought that Howard knew about it and Chepak answered that she believed Howard did because conversations regarding the work stoppage had taken place in an area that was only six feet from Howard's office at a time when the office door was open.

After receiving the information about a potential work stoppage, and discussing it with Latta, Johnson arranged to have managers and personnel from nearby facilities present at the Parma facility on March 11 to cover for the expected absentees. In addition, Latta called the Respondent's other executive directors in the Cleveland area and told them to be available in the event of a work stoppage at the Parma facility. As a result of telephone discussions on the evening of March 10, the Respondent decided to place Smith, Reyes, and Howard on paid administrative leave pending investigation.

On the morning of March 11, individuals from nearby facilities were at the Parma facility prepared to work if, as the Respondent feared, care aides failed to report for work. However, no work stoppage occurred. Every care aide who was scheduled to work at the Parma facility on March 11 appeared for work. Not a single care aide abandoned her duties before the end of the shift, or, as far as the record shows, was even tardy.

Although no work stoppage had occurred, Johnson questioned approximately 12 employees individually on March 11 about employees' discussions regarding such a work action. She also questioned the employees again about the petition and the identity of its author or authors. This questioning took place in Johnson's office, and in at least some instances was attended by Antosh, who took notes. The Respondent's officials did not inform the employees that the meetings were voluntary or that their jobs were not in jeopardy. A number of those questioned informed Johnson that Reyes had been encouraging care aides not to come to work on March 11. Johnson asked at least one care aide whether Smith was involved in preparing the petition.

D. Howard, Reyes, and Smith Placed on Administrative Leave

On March 11, the Respondent placed Smith, Reyes, and Howard on paid administrative leave pending an investigation. Johnson called Smith at her home at 6:30 am and told her to come to the facility that morning even though Smith's shift did not start until mid-afternoon. Smith arrived at the facility at about 10 am and was escorted to a meeting with Johnson, Antosh, and Olsavsky in the private dining room. Johnson told Smith that she was being placed on administrative leave pending an investigation. No one told Smith why she was being placed on leave, and she did not ask. She was not shown anything in writing, or told when she would hear from the Respondent about the matter. That same day, Smith called Dousa after receiving information that led her to believe Dousa had told management that Smith was one of the authors of the petition. Smith felt that Dousa was responsible for getting her in trouble, and she called to confront Dousa about implicating her in the writing of the petition. During the phone call, Dousa denied implicating Smith, although the record indicates that she had, in fact, told Johnson that Smith and Reyes wrote the petition. Smith did not yell at, or threaten, Dousa during the conversation. According to both Smith and Dousa, there had been friction between

them for some time -- going back, it seems, to when Howard demoted Dousa from lead care aide and promoted Smith to the lead position. According to Smith, Dousa had repeatedly tried to get her in trouble. At any rate, Dousa told management about the March 11 phone call from Smith.

Reyes appeared for work as scheduled on March 11. During her shift, she was summoned to Johnson's office, where Johnson and Antosh were present. At this meeting, Reyes was placed on administrative leave. Reyes asked why this was being done, but no one provided an explanation. Reyes said she wanted to speak to Howard, who she believed would explain the reason for the Respondent's action, but Antosh would not permit her to use the phone and threatened to call the police unless Reyes left the premises immediately.

When Howard appeared for work on March 11, she was called into a meeting with Johnson, Antosh, and Olsavsky. Johnson asked Howard whether she knew about the work stoppage. Howard responded that that she had "heard talk" about employees not coming to work, but had treated it as a joke. Johnson placed Howard on a paid administrative leave of unspecified duration pending an investigation. When Howard asked why this was being done, Antosh responded that they did not have to give her a reason. Antosh told Howard to turn over all of the Respondent's papers and property. Howard asked if she could retrieve a printer from her office that was her personnel property, and Antosh said that she should wait at the back door of the facility where the printer would be brought to her. Antosh also told Howard to surrender her pager because "there's no reason" for Howard "being contacted if she's on a leave."

During its investigation, the Respondent obtained signed statements from a number of witnesses. However, it did not obtain signed witness statements from Smith, Reyes, or Howard.

E. Smith Demoted

On March 16, five days after placing Smith on administrative leave, the Respondent demoted her from the lead care position and issued her a final warning.[11] Johnson decided upon this discipline after discussions with Latta and others. Latta credibly testified that the Respondent had concluded that Smith "probably was involved in some way about writing the letter and encouraging employees to call off." However, the disciplinary paperwork did not mention the petition or the work stoppage, but rather stated that the reason for the action was that Smith had "harass[ed] a fellow employee." The harassment referred to by the disciplinary paperwork was the phone call that Smith made to Dousa on March 11. Before presenting Smith with the final warning letter, the Respondent did not ask her to state her side of the story. Indeed, Johnson admitted that she had made the determination to issue the final warning even before she met with Smith. When presented with the demotion and final warning that described the supposed harassment, Smith admitted that she spoke to Dousa, but denied harassing her. Smith signed the warning notice, but wrote on it that she had had problems with Dousa in the past and did not know that she was harassing her on March 11. The disciplinary paperwork does not specify the harassing language that the discipline was based on, nor did Johnson, Antosh, Olsavsky or Latta recount any such language during their testimony. The Respondent does not claim that Smith made threats or used obscenities. Prior to March 2004, Smith had received written warnings from the Respondent in April 2002 (for wearing improper attire and leaving the facility to get breakfast during work time), July 2002 (for failure to provide the appropriate level of care to residents), and in January 2003 (for an improper schedule change).

[11] Smith's demotion was not accompanied by a reduction in pay.

None of Smith's prior discipline was for harassment or other misconduct directed at another employee. These prior warnings were not mentioned in the Respondent's report relating to Smith's demotion and final warning.

The General Counsel presented evidence of lesser discipline received by other employees in an effort to show that Smith was treated more severely than individuals who committed comparable offenses, but who had not been involved with the petition or work stoppage discussions. This included a verbal warning that the Respondent issued in July 2001 to Cheryl Whitt, a lead care aide, after determining that Whitt had yelled at another employee in the presence of residents and family members. Whitt was apparently not demoted from her lead position or even given what the Respondent considered to be a written warning, although the verbal warning was documented in writing. In December 2002, the Respondent counseled Whitt again, this time because Whitt had pointed to a picture of another employee and made a throat-cutting gesture. Based on the Respondent's reports regarding these incidents, it does not appear that Whitt received a written warning in that instance either, nor was she demoted or otherwise punished for the conduct.

The General Counsel also showed that the Respondent issued a written warning to the facility's maintenance coordinator, Mark Kelly, in October 2002, after Dousa complained that he had behaved towards her in a way she found threatening. According to Dousa's written complaint, Kelly threw paperwork Dousa was completing on the floor, screamed at her, drew back his hand as if preparing to strike her, and "got in [Dousa's] face so close that [she] could lick him." The disciplinary report stated that the allegations could not be substantiated through witnesses but that this was "not the first time" Kelly's "demeanor ha[d] come across the [executive director's] desk," and that Kelly had jeopardized the Respondent's "reputation" and "placed Sunrise in a very awkward position because [he had] affected team members." In the report, the Respondent warned Kelly that if he engaged in conduct that created a threatening or hostile environment in the future, the Respondent would discharge him. In addition, Kelly was directed to participate in an employee counseling program. Dousa also received a notice from the Respondent regarding the incident with Kelly. The notice observed that Dousa was constantly "at odds" with Kelly and that this was "causing mayhem" and making other employees "uncomfortable." Dousa was directed to participate in the same employee counseling program as Kelly, but apparently did not receive what the Respondent designated as a warning of any kind.

The Respondent introduced disciplinary paperwork stating that Shanda Davis, a care aide, was terminated in July 2001 for verbally abusing another care aide. Davis' verbal abuse included threats of bodily harm. The Respondent based the termination not only on that incident, but on the fact that Davis had received warnings twice in the previous two months – once for conduct involving a co-worker and once for problems "meeting resident and family needs."

F. Reyes Discharged

After Reyes was placed on leave, no one from the Respondent contacted her until March 15, when Johnson directed her to come to the facility the following day. Reyes appeared on March 16 and met with Johnson and Antosh. Antosh asked whether Reyes had written the petition. Reyes said that she did not know who wrote the petition. Johnson said that the investigation found that Reyes had actively encouraged a work stoppage. Reyes denied this. Antosh told Reyes that she was terminated and had to leave. This discipline decision was made by Johnson, as a result of discussions with Latta and others. Reyes was not given, or shown, a written statement of the discipline or the reasons for it, during the meeting. Later, the

Respondent told Reyes that she could send a request by certified mail for the disciplinary report, but Reyes never made such a request. The Respondent's report, which is dated March 16, states that Reyes was discharged under the rule prohibiting employees from "[c]ommitting any unlawful act on the community's property that brings discredit to Sunrise, which affects its normal operation." The disciplinary report explains that Reyes "was telling several care [aides] to call off for 3/11/04." Johnson signed the disciplinary report, but during her testimony she was unable to specify the "unlawful act" that Reyes had committed. She stated, instead, that Reyes had put the facility's license at risk by advocating a work stoppage. Reyes had not received any other discipline from the Respondent between the time of her most recent hiring on August 18, 2002, and the time of her discharge on March 14, 2004.

The Respondent introduced documentary evidence showing that it had discharged approximately 10 employees since 2000 for failing to appear for scheduled work without calling the Respondent. According to Latta, under those circumstances the Respondent would first attempt to contact the individuals to let them know they were scheduled to work. If the individuals could not be reached, and did not explain their absences, they were terminated because the Respondent concluded that they no longer wished to continue in the position. The Respondent also showed that during the same time period it had terminated employees for a variety of other reasons, including: leaving work without permission; doing personal laundry at facility while on-duty; sleeping on the job; insubordination; poor performance; and, abusing a resident.

G. Howard Discharged

The record is clear that the Respondent considered Howard an exemplary supervisor prior to March 9, 2004. Howard's last performance appraisal, dated November 19, 2003, awarded her an overall score of "5" on a scale of 1 to 5 -- the highest possible rating.[12] The appraisal states that Howard "epitomizes Sunrise philosophies day in day out." The section on customer service reads: "Look up Sunrise Customer Service – see Rosie for details – SUPER JOB !!" (Capitalization in Original). Regarding her communications with other department heads, the appraisal states that Howard "has developed trust in the other Dept. Heads which has lead to the Whole Home working more cohesively." The appraisal concluded that Howard "knows, practices and preaches the Sunrise way!!!" The Respondent had never disciplined Howard prior to March 2004. It was common for Howard to work at the Parma facility 12 to 18 hours a day, 5 or 6 days a week.

The day after Johnson informed Howard that she was being placed on administrative leave, Howard took a trip out-of-town until March 17. During the period prior to her return, Howard did not attempt to contact officials of the Respondent to tell them how to reach her or to tell her side of the story.[13] On March 15, Johnson called Howard's residence and left one or more messages asking Howard to come in for an interview. Howard did not retrieve these messages until March 18. In the meantime, on March 16, prior to talking to Howard about the investigation, Johnson executed disciplinary paperwork terminating Howard's employment. Johnson arrived at this discipline after discussions with Latta and others. The same day that

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[12] In this rating system, "1" standards for "review needed," "2" for "development needed," "3" for "quality," "4" for "model," and "5" for "exemplary."

[13] Howard stated that she left town after being placed on administrative leave because the Respondent had not given her a timeline for its decision. She stated that she had been working hard and that her mother had recently died, and that these factors played into her decision to leave town and visit her daughter.

Johnson executed paperwork for Howard's termination, she sent a letter to Howard by regular mail, airborne express, and a courier service. The letter stated that unless the Respondent heard from Howard by the close of business the next day, March 17, a disciplinary decision would be made "with or without" Howard's "side of the story." The attempts to deliver the letter by airborne express and courier were not successful. Howard credibly testified that she had never seen the letter, but Johnson testified, also credibly, that she had not received anything indicating that the copy of the letter sent by regular mail was undeliverable.[14]

When Howard retrieved her recorded phone messages on March 18, she discovered that Johnson had left one. Howard contacted Johnson by phone, and the two arranged to meet at the Parma facility the next day. On March 19, Howard met with Johnson and Antosh at the facility. Antosh told Howard that she was being terminated. Antosh said that this was being done because "there was going to be a walkout and you didn't tell Sue [Johnson] about it." At this meeting, the Respondent did not give Howard an opportunity to provide a written statement. However, Howard verbally stated that she did not think the talk of a work stoppage was serious. Howard refused to sign the disciplinary paperwork.

The paperwork for Howard stated that the reason for her discharge was violation of the Respondent's policy against "[c]ommitting any unlawful act on the community's property which affects its normal operation." However, during her trial testimony, Johnson could not identify any unlawful action by Howard. Instead, she stated that Howard's supposed acquiescence in a staff work stoppage could have put the facility's license at risk. In addition to the language about an "unlawful act," the disciplinary paperwork states that Howard's "[f]ailure to inform the Executive Director to prevent a complete walk out" of care aides and "complete lack of action" when approached by staff about this had "endanger[ed] residents."

In an effort to show that it had treated Howard the same as other supervisory personnel who engaged in comparable conduct, the Respondent introduced evidence showing that it discharged Michelle Myers, who supervised the kitchen at the Respondent's Rocky River facility, for "lack of communication with Executive Director regarding serious employee relations issues in a timely fashion."

H. The Complaint Allegations

The complaint alleges that the Respondent violated section 8(a)(1) of the Act: on about March 11, 2004, and on about March 16, 2004, by unlawfully interrogating employees concerning their protected concerted activities and the protected concerted activities of others; on about March 16, 2004, by discriminatorily demoting Coty Smith because she had concertedly complained about wages, hours, and working conditions; on March 16, 2004, by discharging employee Samantha Reyes because she had concertedly complained about wages, hours, and working conditions; and, on about March 19, 2004, by discharging Rosie Howard, a supervisor, because she refused to commit unfair labor practices.

[14] The record does not show whether anyone other than Howard had access to her mail deliveries.

III. Analysis and Discussion

A. Alleged Violations of Section 8(a)(1)

1. Interrogations

The General Counsel alleges that the Respondent unlawfully interrogated employees on March 10 when Johnson, Antosh, and Olsavsky met with small groups of employees and questioned them about the petition, and on March 11 when Johnson called care aides to her office one-at-a-time to question them about the petition and employee discussions regarding a work stoppage.[15] The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-93 (1990). Relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177-78 (1984), affd. 760 F.2d 1006 (9th Cir. 1985).

Given the totality of the circumstances in this case, I conclude that the Respondent engaged in interrogations on March 10 and 11 that reasonably tended to coerce employees in the exercise of their Section 7 rights. The persons acting as interrogators included the highest-ranking official at the Parma facility – Johnson, the executive director -- and in most cases one or two management officials from outside the facility. The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that questioning was coercive. See, e.g., *Stoody*, supra. In addition, the individuals being questioned were generally low-level employees who did not report directly to the executive director. Moreover, Johnson was not only a high-level supervisor, but also one who had only recently come to the facility. As a result, the employees had very little chance to get to know her and limited experience regarding her management style and proclivities with respect to discipline. Because of these factors, employees would reasonably tend to find an interrogation by Johnson even more intimidating than it might otherwise be.

The way in which Johnson and Antosh conducted the questioning was also coercive. They did not assure the interviewees that their participation was voluntary or that the purpose of the interviews was something other than to discipline those who actively supported the petition. Indeed, when one employee sought such assurances -- asking Johnson whether the person who wrote the petition would be in trouble -- Johnson declined to reassure her. On the other hand, Johnson chastised a care aide, Cynthia Boldan, for signing the petition -- stating that if anyone had a problem it could be dealt with by talking directly to Johnson, and that there was no need to write anything down in a group letter. It is not surprising that during the questioning Johnson betrayed hostility towards the petition, since Johnson's testimony indicated that in her view it was not "nice" of the employees to present their concerns collectively in the form of a written petition, rather than by coming to her individually.

The questions that Johnson and Antosh asked contributed to the coercive character of the interrogations. Those questions did not focus on understanding or addressing the concerns

[15] The General Counsel appears to have abandoned the complaint allegation that the Respondent unlawfully interrogated employees on or about March 16, 2004.

that the care aides had expressed, but rather on getting the interviewees to unmask the person or persons behind the petition and the work stoppage discussions.[16] When two employees denied knowing who had written the petition, Johnson and Antosh did not accept this, but rather pressed those employees again and again to reveal the information. The coercive effect of the interrogations was heightened when, days later, the Respondent disciplined Smith, Reyes, and Howard. Other employees would reasonably conclude that by participating in a petition, or discussing a work stoppage, they could expose themselves to the risk of discipline.

According to Johnson and Antosh, they made the interviewees relaxed and comfortable during the interrogations. This assertion, even if true, would not change the outcome here since the Board generally does not consider whether an interrogation actually coerced employees in the exercise of their rights under the Act, but whether the interrogation would reasonably tend to have that effect. See *Williamhouse of California*, 317 NLRB 699, 713 (1995); *El Rancho Market*, 235 NLRB 468, 471 (1978), enfd. 603 F.2d 223 (9th Cir. 1979); *American Freightways Co.*, 124 NLRB 146, 147 (1959). At any rate, the claims by management witnesses that they could tell the employees were not intimidated or coerced during the interrogations is rebutted by the testimony of the interviewees themselves. Tania Kaufmann, one of the Respondent's own witnesses, testified that it was during the questioning by Johnson that she began to regret that she had signed the petition. Another care aide, Amber Hines, testified that during the questioning she lied and said she had not read the petition because she feared she might loss her job. A third care aide, Boldan, testified that she was fearful of losing her job during the interrogation and therefore made no response when Johnson asserted that the employees did not have to express their complaints in the form of a group letter. Another care aide was seen visibly shaking when she left the interrogation.

The record contains little credible evidence that weighs in favor of finding the interrogations non-coercive. With respect to the March 10 interrogations, the coercive character was minimally diminished by the fact that the questioning took place in an area that was visible to others, as well as by the fact that the interviewees were questioned in small groups, rather than in isolation. However, even the March 10 interrogations were coercive given the other indicia discussed above.

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[16] Johnson claimed that she had to find out who the authors of the petition were because many of those who signed had not read it and she wanted to talk to those employees whose views the petition expressed. This contention does not hold water. First, the Respondent has not provided a reasonable basis for believing that the petition did not express views held by most of its signatories. A number of care aides had signed the petition based on a verbal description of its contents, but the record does not show that most had done this. Nor does the record show that care aides who signed based on a verbal description necessarily did not agree with what the petition stated. Indeed, there was testimony that care aides who signed the petition without reading it shared one or more of its concerns. At any rate, if Johnson legitimately needed more facts relating to the petition concerns she could have ascertained those facts from people familiar with them, without seeking to identify the petition's organizers. As is their right under Section 7 of the Act, those individual organizers had chosen to protest their working conditions by joining with other employees to complain in a concerted manner. Even if Johnson's only motive in seeking their identities was to ask them why they had organized the petition -- and the record leaves little doubt that that was not her only, or even her primary, motive – it was coercive to question employees with the intention of unmasking the organizers and forcing them to stand before her as individuals.

For the reasons discussed above I conclude that the Respondent violated Section 8(a)(1) on March 10 and 11, 2004, by coercively interrogating employees about protected concerted activities.

2. Discipline

a. Coty Smith

In order to establish that the Respondent violated Section 8(a)(1) by demoting and issuing a final warning to Smith, the General Counsel must show that Smith "had engaged in activity which was both concerted and protected and that such activity was the cause, in whole or in part, of the [discipline]." *Liberty Natural Products, Inc.*, 314 NLRB 630, 637 (1994), enfd. 75 F.3d 369 (9th Cir. 1995) (Table), cert. denied, 518 U.S. 1007 (1996); see also *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1088-89 (2002), enfd. 2003 WL 22221353 (2d Cir. 2003); *C.D.S. Lines, Inc.*, 313 NLRB 296, 300 (1993), enfd. 39 F.3d 1168 (3rd Cir. 1994) (Table); *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded by 755 F.2d 941 (D.C Cir. 1985), cert denied 474 U.S. 971 (1985), decision on remand 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988).

I conclude that the General Counsel easily establishes the elements of a violation with respect to Smith. Smith engaged in concerted activity by signing a group petition regarding employees' terms and conditions of employment and acting as one of the three employees who presented the petition to Johnson. The Board has held that this type of group approach to an employer is concerted and protected by the Act. See, e.g., *Liberty Natural*, 314 NLRB at 630; *Kysor Industrial Corp.*, 309 NLRB 237, 237-38 (1992). There is no dispute that several of the Respondent's officials, including Johnson and Latta, were aware of the petition and knew that it represented the group action of a number of its employees.

I also conclude that Smith and other employees engaged in protected activity by discussing whether they should engage in a work stoppage to protest their working conditions. Employees of health care institutions have the right to engage in strikes that are not "unlawful, violent, in breach of contract, or otherwise indefensible." *Bethany Medical Center*, 328 NLRB 1094 (1999). The Board has, on numerous occasions, found health care institutions in violation of the Act for issuing discipline based on an employee's participation in a work stoppage. See, e.g., *Vencare Ancillary Services*, 334 NLRB 965, 968-971 (2001), enf. denied 352 F.3d 318 (6th Cir. 2003); *Bethany Medical Center*, supra; *Health Care & Retirement Corp.*, 310 NLRB 1002, 1017-18 (1993); *East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996 fn. 2 (1982), enfd. 710 F.2d 397 (7th Cir. 1983), cert. denied 465 U.S. 1065 (1984); *Mercy Hospital Association, Inc*., 235 NLRB 681, 683 (1978). Section 8(g) of the Act creates a narrow exception requiring labor organizations to give advance notice before striking against health care institutions, but the Act does not extend that exception to work stoppages that are called by unorganized employees. *Bethany Medical Center*, 328 NLRB at 1094; *Mercy Hosp. Ass'n, Inc.*, 235 NLRB at 683; *Walker Methodist Residence and Health Care Center*, 227 NLRB 1630, 1631 (1977). The Parma facility's care aides were not, and as far the record shows have never been, represented by a labor organization.

At any rate, the question in this case is not whether a work stoppage by the Parma facility's care aides would have been protected, since neither Smith nor any other employee actually engaged in such an action. Rather the question is whether the Respondent can lawfully discharge employees for *discussing* whether they should engage in a work stoppage. The answer to that question is "no." In *Magnolia Manor Nursing Home*, 260 NLRB 377, 386 (1982), the Board affirmed that a nursing home could not lawfully discharge an employee for

unsuccessfully trying to organize an employee walkout. In another case, *Three Fountains Nursing Center*, 184 NLRB 294, 295 (1970), a nursing home was found to have violated the Act by discharging a nursing aide who it believed had made statements threatening and instigating a walkout. Moreover, Board precedent makes clear that the care aides' discussions of a work stoppage would still be protected activity even if the work stoppage they were discussing was not itself protected.[17] See, e.g., *KQED, Inc.*, 238 NLRB 1, 2 (1978) (employee is engaged in protected activity when talking in support of a work stoppage, even though the work stoppage itself would have been forbidden), enfd. 605 F.2d 562 (9th Cir. 1979) (Table); *Can-Tex Industries*, 256 NLRB 863, 872 (1981) (employee's "mere talk" in support of a shutdown is protected activity, even if shutdown itself was not protected), enfd. in relevant part 683 F.2d 1183 (8th Cir. 1982). That precedent is consistent with the purposes and policies of the Act since allowing employers to discipline employees for discussing concerted protests that might fall outside the protection of the Act would undoubtedly chill employees from discussing other forms of concerted activity, including many forms that are protected by Section 7.

The Respondent relies on the testimony of Kurt Haas, an expert on the regulation of long-term care providers in the state of Ohio, to argue that such regulations required it to take the disciplinary action it did against Smith. Haas testified that a nursing home could be "in harm[']s way, in terms of [its] license" if it did not discipline workers who engaged in a 1-day work stoppage. The Respondent provides no authority for its unstated assumption that State regulations regarding long-term health care providers would take precedence over the policies or provisions of the National Labor Relations Act in the event that the two came into conflict. In any case, no conflict was shown here since even Haas did not testify that Ohio regulations required long-term providers to discipline workers for discussing or debating whether to engage in a work stoppage. To the contrary, Haas testified that he was not aware of a single case in which a facility had lost its license based on employee discussions regarding a work stoppage.

The Board has held that an employee engaged in protected discussions of concerted activity can forfeit the protections of the Act by making remarks that are "so offensive, defamatory or opprobrious" as to remove the activity from the protection of the Act. *KBO Inc.*, 315 NLRB 570 (1994), enfd. 96 F.3d 1448 (6th Cir. 1996) (Table); *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1971). Nothing in Smith's remarks regarding a work stoppage removes the conversation from the zone of protected activity. Smith did not threaten or apply undue pressure to Boldan or anyone else in support of the idea of a work stoppage. She did not state, or imply, that she would use her position as lead care aide to reward or punish anyone based on whether he or she participated. Smith was not shown to have used

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[17] The cases cited earlier, finding that health care institutions violated the Act by disciplining employees who engaged in strikes, suggest that an actual work stoppage by the care aides might well have been protected activity. However, a definitive determination would depend on factors such as the number of employees who participated, the strike's duration, and the steps employees took to safeguard the resident's well-being before leaving the facility – details that would have to be invented in this case since no work stoppage occurred. In making its arguments, the Respondent assumes that the work stoppage would have involved all the facility's care aides and serious danger to residents. However, the evidence it presented did not show that a widespread work stoppage by care aides was ever a real possibility. A number of employees testified that they had been approached by Reyes or Smith about participating, but most of those employees also testified that they responded by saying they would not take part. The Respondent has failed to show that it could not have covered for the absences of a few care aides given that it employed 25 or more such employees at the Parma facility, and had four other facilities in the Cleveland area.

obscenities or other offensive language. The record does not even show that Smith ever said that she herself supported, or planned to participate in, a work stoppage.

The requirement that the General Counsel show that the adverse decision was motivated in whole or in part by the protected activity is satisfied in this instance by direct evidence of animus. Johnson was annoyed that the employees had chosen to present their complaints in the form of a group petition, rather than by coming to her individually. Indeed, Johnson was so disturbed by the petition that she resorted to unlawful questioning of employees in an effort to discover its authorship. There is no doubt that the Respondent knew that Smith had signed and presented the petition, and that it believed she had been involved in discussions regarding a possible work stoppage. As Latta stated, the Respondent's pre-discipline investigation showed that Smith "was probably involved in some way about writing the letter and encouraging employees to call off." The timing of Smith's demotion also supports the conclusion that the petition and the discussions of a work stoppage motivated, in whole or in part, the Respondent's decision. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994). The Respondent placed Smith on involuntary leave only 2 days after she, along with Reyes and Balukh, presented the petition to Johnson. Smith was demoted 5 days later, on March 16, immediately after the Respondent concluded that she had helped write the letter and advocate a work stoppage.

For the reasons discussed above, I conclude that the General Counsel has established the elements of a violation by showing that Smith engaged in activity that was both concerted and protected and that such activity was the cause, in whole or in part, of the Respondent's decision to demote her and issue the final warning. Once the General Counsel shows that the employer's decision to discipline an employee was motivated by unlawful discrimination, the Respondent can avoid liability by showing that it would have issued the same discipline even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083, 1087-89 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983); *Vico Products Co.*, 336 NLRB 583, 587 fn.15 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003); see also *Holder Construction Co.*, 327 NLRB 326 (1998) (*Wright Line* burdens apply to question of whether employee was discriminatorily disciplined on the basis of protected concerted activities in violation of Section 8(a)(1).). The Respondent cannot meet that burden merely by showing that employee misconduct also factored into the Respondent's decision. Rather, the Respondent must show by a preponderance of the evidence that the misconduct would have resulted in the same discipline even in the absence of the employee's protected activities. *Monroe Manufacturing*, 323 NLRB 24, 27 (1997).

The Respondent claims that it disciplined Smith for harassing another employee, Dousa, on the morning of March 11. The record shows that after being ordered to meet with Johnson, Smith initiated a phone call with Dousa during which she accused Dousa of implicating her as an author of the petition. It was not shown that during this conversation Smith explicitly or impliedly threatened to harm Dousa in any way, or used any abusive, obscene or offensive language. I believe that Smith's statements to Dousa were themselves part of the res gestae of Smith's protected activity of supporting the petition. Those statements were not shown to be so flagrant or egregious as to warrant denying them the protection of the Act. *Tri-County Mfg. & Assembly*, 335 NLRB 210, 219 (2001), enfd. 2003 WL 21675335 (6th Cir. 2003) ; *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982), enfd. 711 F.2d 1059 (6th Cir. 1983); see also *McCarty Foods*, Inc., 321 NLRB 218 (1996) (employee's "alleged 'harassment' of fellow employees" about union cards was "protected union activity"). The burden is on the Respondent to show that Smith made statements to Dousa that removed her from the protections of the Act. *NLRB v. Burnup & Sims,* 379 U.S. 21, 23 and fn. 3 (1964). The Respondent has not met that

burden. Therefore, the Respondent's claim that it disciplined Smith on the basis of her phone call to Dousa, even if true, does not excuse its unlawful motivation, but confirms it.

Assuming that Smith's phone call was not itself protected activity, the Respondent has failed to carry its burden of showing that the phone call would have resulted in the same discipline absent Smith's involvement in the protected petition and\or the work stoppage discussions. Indeed, Smith was not shown to have said anything during the phone call that would reasonably be expected to warrant any type of discipline at all. Moreover, before deciding to discipline Smith, the Respondent interviewed Dousa, but not, as required by its own investigations policy, Smith. This failure is an indicia of discriminatory intent. See *Government Employees (IBPO)*, 327 NLRB 676, 700-701 (1999), enfd. 205 F.3d 1324 (2d Cir. 1999) (Table); *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir. 2000). As discussed above, the Respondent issued lesser discipline to two employees – Cheryl Whitt and Mark Kelly – for co-worker harassment that was at least as serious as anything attributed to Smith. The Respondent introduced evidence showing that it terminated another care aide, Shanda Davis, for verbally abusing a co-worker. However, the verbal abuse for which this supposed comparator was terminated included threatening a co-worker with bodily harm, something the Board has always viewed as particularly serious. See *Briar Crest Nursing Home*, 333 NLRB 935, 937-38 (2001). Smith, on the other hand, was not shown to have said anything that could even be characterized as "verbal abuse," much less as a threat of bodily harm. The paperwork regarding the supposed comparator showed that the Respondent based its disciplinary action on the two other warnings she had received in the prior two months, one of which also involved her conduct towards a co-worker. Although Smith had previously received warnings, that discipline was not mentioned in the paperwork explaining the basis for her demotion, and the Respondent did not show that it played a part in its decision. Smith's prior discipline was issued more than a year before her demotion, and did not involve conduct similar to that for which the Respondent claims it demoted her. I find that the evidence presented by the Respondent falls far short of proving that it would have issued the same discipline to Smith absent her protected activity.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) of the Act by demoting and issuing a final warning to Coty Smith on March 16, 2004, because she had engaged in protected concerted activity.

b. Samantha Reyes

I also find that the General Counsel has shown that the Respondent's decision to discharge Reyes was unlawfully motivated. Reyes was one of the employees who presented the petition to the Respondent, and during conversations with other employees she advocated that they protest their working conditions by engaging in a group work stoppage. Reyes did not unduly pressure anyone to join in the petition or the work stoppage. The record does not show that she stated, or implied, that she would use her position as lead care aide to reward or punish anyone depending on whether they agreed to participate, nor did it show that she used obscenities or offensive language. In reaching this conclusion, I considered that while advocating a work stoppage, Reyes exaggerated the amount of support her position had among other employees. Such exaggerations, however, do not remove Reyes' efforts to encourage a work stoppage from the protection of the Act. The Board has repeatedly held that an employee's overstatement of support among other employees is mere "puffery," not objectionable conduct. See *Brylane, L.P.*, 338 NLRB 538, 543 (2002); *Rapera, Inc.*, 333 NLRB 1287, 1288 (2001); *Winco Petroleum Co.*, 241 NLRB 1118 (1979), enfd. 668 F.2d 973 (8th Cir. 1982); *Marie Phillips, Inc*., 178 NLRB 340 (1969), enfd. 443 F.2d 667 (D.C. Cir. 1970), cert. denied 403 U.S. 905 (1971). For these reasons, as well as those discussed earlier, I conclude

that Reyes' support for the petition and the idea of a work stoppage were protected concerted activities.

There is no doubt that Reyes' discharge on March 16 was motivated by these protected activities. Indeed, with respect to Reyes' advocacy of a work stoppage, the Respondent continues to state that this was the reason that Reyes was discharged. The record also leads me to conclude that Reyes' participation in the petition, and the belief that Reyes was an author and organizer of the petition, played some part in the discipline. Johnson was shown to be hostile toward the petition and her insistence on trying to unmask its authors – in some cases through unlawful interrogations -- leaves little doubt of her willingness to act against those behind the petition once she identified them. As with Smith, the Respondent did not give Reyes an opportunity to provide her version of events before deciding on discipline – a further indicia of discriminatory motive. See *Government Employees (IBPO)*, supra; *New Orleans Cold Storage*, supra.

Under *Wright Line*, supra, the Respondent can avoid liability by showing that it would have issued the same discipline absent the protected activity. In this case, the Respondent has not asserted any basis for its action other than Reyes' protected activity of encouraging employees to engage in a work stoppage. Therefore, the Respondent has failed to meet its burden.

The Respondent introduced evidence that other employees were terminated because they had failed to report to work without calling the Respondent. The conduct of those individuals is not comparable. First, Reyes did not fail to report for work. The Respondent did not show that it had ever terminated anyone under its no call\no show policy who had not actually failed to work as scheduled. Second, none of the other incidents of discipline raised by the Respondent involved employees who failed to report to work as part of a concerted protest over working conditions. To the contrary, Latta testified that the persons terminated under the no call\no show policy were employees who the Respondent concluded were not interested in continued employment because they had stopped coming to work without explanation. Under the Act, that individual misconduct cannot be equated with Reyes' protected discussions of a concerted employee protest.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) of the Act by terminating the employment of Samantha Reyes on March 16, 2004, because she had engaged in protected concerted activity.

c. Rosie Howard

The General Counsel alleges that the Respondent unlawfully discharged Howard because she refused to carry out Johnson's order to discover who authored the petition. Howard was a statutory supervisor pursuant to Section 2(11) and therefore may legally be discharged for refusing to support the Respondent's opposition to protected activities. *Pontiac Osteopathic Hospital*, 284 NLRB 442, 442-43 (1987); *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982). However, even a supervisor's discharge violates the Act if that discharge is motivated by the supervisor's refusal to commit an unfair labor practice. *Trus Joist MacMillan*, 341 NLRB No. 45 (2004), slip op. at 22; *Parker-Robb Chevrolet, Inc.*, 262 NLRB at 402-03.

On March 9, after Johnson received the care aides' petition, she asked if Howard knew who had written it. Howard said she did not know, and Johnson expressed dissatisfaction with that response. Then Johnson told Howard that they had to find out who wrote the petition. Howard said that she would not ask the care aides to reveal the petition's author. The General

Counsel contends that the Respondent unlawfully discharged Johnson for refusing to violate the Act by "carry[ing] out Johnson's directive" that they "find out who wrote the petition." The Respondent counters that Johnson's statement that "we" have to find out who wrote the petition, was not a directive that Howard seek that information, and that even if it was, Howard could have complied by "going about her normal business and keeping her ears tuned and her eyes open," without committing any unfair labor practice.

The question of whether Howard refused to commit an unfair labor practice is a close one, as is the question of whether Howard's response to Johnson was a motivation for the discharge. However, I need not decide those issues because the Respondent has met its burden of showing that it would have discharged Howard based on her response to the rumors of a work stoppage, even if she had not declined to find out who wrote the petition. See *Wright Line*, 251 NLRB at 1089.[18] The record shows that, rightly or wrongly, the Respondent took the rumors of a work stoppage far more seriously than Howard did. Johnson and Latta went to considerable trouble on March 10 to make personnel from other facilities available on March 11 to cover for the anticipated absences at the Parma facility. It is inconceivable to me that they would have taken these steps, which were sure to cause some disruptions for the other locations and their personnel, unless Johnson and Latta believed the possibility of a widespread, potentially harmful, work stoppage at the Parma facility was very real. Therefore, I would fully expect Johnson to be appalled when she discovered that Howard, who received essentially the same information about the potential work stoppage as Johnson, had treated it as a joke. Under these circumstances, I accept that the Respondent considered it an extremely serious lapse in judgment, necessitating discharge, that Howard did not report the rumors of a work stoppage to her superiors and did not actively discourage the employees who sought her guidance from taking part in such an action. The record shows that the Respondent had previously discharged another supervisor, Myers, for failing to report labor relations information to the executive director. I conclude that the Respondent has met its burden of showing that it would have discharged Howard even if she had not declined to try to discover who wrote the petition.

For the reasons stated above, I conclude the allegation that Howard was unlawfully discharged in violation of Section 8(a)(1) should be dismissed.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about protected activities on March 10 and 11, 2004.

3. The Respondent violated Section 8(a)(1) of the Act by demoting and issuing a final warning to Coty Smith on March 16, 2004, because she had engaged in protected concerted activities.

[18] The General Counsel and the Respondent both state, and I agree, that the Respondent's defense that it would have discharged Howard for non-discriminatory reasons should be analyzed pursuant to the *Wright Line* standards. Brief of General Counsel at 44 (citing *Pioneer Hotel Gambling Hall*, 324 NLRB 918, 929 (1997)); Brief of Respondent at 53.

4. The Respondent violated Section 8(a)(1) of the Act by terminating the employment of Samantha Reyes on March 16, 2004, because she had engaged in protected concerted activities.

5. The Respondent was not shown to have violated the Act by terminating the employment of Rosie Howard on March 19, 2004.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent discriminatorily terminated Samantha Reyes and therefore must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent has discriminatorily demoted Coty Smith, and therefore must offer her reinstatement to the position from which she was unlawfully demoted and make her whole for any loss of earnings and other benefits,[19] calculated in the same manner as for Reyes.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[20]

ORDER

The Respondent, Sunrise Senior Living, Inc., Parma, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Coercively interrogating any employee about protected concerted activities.

(b) Discharging, demoting, warning, disciplining or otherwise discriminating against any employee for engaging in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Coty Smith full reinstatement to the position from which she was demoted on March 16, 2004, or if that job no

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[19] The record shows that Smith's pay was not reduced at the time she was demoted, however, the record does not rule out the possibility that her demotion subsequently resulted in a loss of benefits.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, offer Samantha Reyes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Coty Smith and Samantha Reyes whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful demotion and final warning issued to Coty Smith, and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Samantha Reyes, and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Parma, Ohio, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2004.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

_____
Paul Bogas
Administrative Law Judge

JD–15–05
Cleveland, OH

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about employees' protected concerted activities.

WE WILL NOT discharge, demote, warn, or otherwise discriminate against you for drafting, circulating, signing, presenting, or supporting a group statement of employee complaints.

WE WILL NOT discharge, demote, warn, or otherwise discriminate against you for discussing with other employees whether to engage in a work stoppage to protest working conditions.

WE WILL NOT discipline you for engaging in protected concerted activity

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Coty Smith full reinstatement to the position from which she was demoted on March 16, 2004, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of this Order, offer Samantha Reyes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Coty Smith and Samantha Reyes whole for any loss of earnings and other benefits resulting from the discipline against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of Coty Smith and Samantha Reyes, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

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(Employer)

Dated _____ By _____

(Representative) (Title)

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